Recent Developments in Sentencing: Tying Up Loose Ends

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Introduction

Every year is a busy year when it comes to recounting the annual cases that addressed sentencing issues. The past year was filled with court decisions at all levels that addressed sentencing issues from all services. To say there was a common theme or trend is difficult, maybe impossible. There appeared to be a concentrated effort by the Court of Appeals for the Armed Forces (CAAF), however, to tie up and clarify some areas of sentencing. This article discusses the year's most important military sentencing cases and is divided into four major sections: the government's case in aggravation, the defense's case in extenuation and mitigation, sentencing arguments, and sentencing instructions. The first three sections of this article involve pre-sentencing procedure, and most of the cases discussed in the article fall within some aspect of the pre-sentencing phase.

The rules governing pre-sentencing procedures are generally found in Rule for Courts-Martial (RCM) 1001.[1] The purpose of the pre-sentencing case is to provide matters that will aid the court in determining an appropriate sentence for the accused. The sequence in presenting that evidence begins with the government presenting matters listed in RCM 1001(b),[2] followed by the defense presenting evidence in extenuation and mitigation under RCM 1001(c).[3] If desired, rebuttal by the government and surrebuttal by the defense is permitted, and then both sides have an opportunity to present a sentencing argument.[4]

After presentation of the pre-sentencing evidence and the sentencing arguments of counsel, the trial moves into the sentencing phase. The military judge provides sentencing instructions to the court members, and following proper deliberation, the members determine an appropriate sentence.[5] The fourth section of this article, provides a review of the significant decisions in the area of sentencing instructions.

The Government Case in Aggravation

Any evidence the government introduces in its pre-sentencing case must fall within one of five categories listed in RCM 1001(b).[6] The first category is the accused's service data from the charge sheet,[7] which the trial counsel simply provides to the court at the beginning of the government's pre-sentencing case. This category receives little attention; however, various court decisions addressed the four remaining categories this past year. This section discusses the more significant decisions addressing those categories.[8]

Personal Data and Character of Prior Service

The second category of government pre-sentencing evidence is the "personal data and character of prior service of the accused" and is found in RCM 1001(b)(2).[9] The rule specifically allows the trial counsel to "obtain and introduce from the personnel records of the accused evidence of the accused's mar-

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (2000) [hereinafter MCM].

2. *Id.* R.C.M. 1001(b).

3. *Id.* R.C.M. 1001(c).

4. *Id.* R.C.M. 1001(d), (g). Rule for Courts-Martial 1001(d) provides for rebuttal and surrebuttal. *See id.* R.C.M. 1001(d). Although not discussed in this article, one CAAF decision this past year addressed rebuttal. *See* United States v. Hursey, 55 M.J. 34 (2001) (abuse of discretion to allow noncommissioned officer in charge (NCOIC) of base legal office to testify in rebuttal that accused was late for his own court-martial in which NCOIC was unable to say whether the accused was at fault). Rule for Courts-Martial 1001(g) provides for sentencing argument. *See* MCM, *supra* note 1, R.C.M. 1001(g); *infra* notes 99-123 and accompanying text.

5. MCM, *supra* note 1, R.C.M. 1005-1007.

6. *Id.* R.C.M. 1001(b). Those five categories are RCM 1001(b)(1), Service data from the charge sheet; 1001(b)(2), Personal data and character of prior service of the accused; 1001(b)(3), Evidence of prior convictions; 1001(b)(4), Evidence in aggravation; and 1001(b)(5), Evidence of rehabilitative potential. *Id*.

7. *Id.* R.C.M. 1001(b)(1).

8. This article does not address rehabilitative potential evidence under RCM 1001(b)(5) because there were no significant CAAF opinions on this subject. One service court opinion this past year that touches upon RCM 1001(b)(5), however, is *United States v. Bish*, 54 M.J. 861 (A.F. Ct. Crim. App. 2001), *petition for grant of review denied*, 55 M.J. 371 (2001) (euphemism rule does not appear to apply to defense). *But cf.* United States v. Hoyt, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *petition for grant of review denied*, 54 M.J. 365 (2000) (improper for either prosecution or defense to offer an opinion regarding whether to return an accused to his unit); United States v. Ramos, 42 M.J. 392 (1995) (suggesting the euphemism rule may apply to the defense).

ital status; number of dependents, if any; and character of prior service."[10] This rule was at issue in *United States v. Anderson.*[11]

In *Anderson*, the accused was convicted of an unauthorized absence and wrongful use of marijuana.[12] During its pre-sentencing case, the government offered as a military personnel record a document purporting to approve the accused's request for discharge in lieu of trial by court-martial.[13] The defense objected to the admissibility of the document under Military Rule of Evidence (MRE) 410(a)(4),[14] arguing that the document was derived from a statement made in the course of negotiations in a previous case against the accused. The military judge admitted the document into evidence, holding that it did not fall within the scope of MRE 410 because the document was not related to the charges before the court-martial. On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) held that the "correspondence pertaining to an administrative discharge in lieu of court-martial was admissible as a personnel record [and] that it was not within the ambit of MRE 410 because it did not pertain to the charges before the court-martial."[15]

The CAAF disagreed with the service court, reemphasizing several points from *United States v. Vasquez*,[16] a case with a similar issue decided five months before *Anderson*. First, MRE 410 does not just protect the plea-bargaining statements made in relation to offenses pending before the court-martial at which they are offered. It protects plea-bargaining statements made in relation to any offense still pending. Second, the charges giving rise to an administrative discharge in lieu of trial are still pending until the accused receives an executed discharge. Third, MRE 410 must be interpreted broadly to support the policy behind the rule, which is to encourage a "flow of information during the plea-bargaining process."[17] Finally, although RCM 1001(b)(2) permits the introduction of information from the accused's personnel records, "it does not provide blanket authority to introduce all information that happens to be maintained in the accused's personnel records."[18]

What distinguishes *Anderson* from *Vasquez* is the absence of an actual admission of guilt. In *Vasquez*, the government had sought to introduce the accused's request for an administrative discharge in lieu of trial for a previous 212-day unauthorized absence that was not charged at trial. Accompanying the request for discharge was an admission by the accused that he was guilty of the unauthorized absence.[19] No admission of guilt accompanied the document offered by the trial counsel in *Anderson.* The court in *Anderson*, however, found this distinction irrelevant. The CAAF stated that the accused's request for discharge in lieu of trial was "tantamount to a statement because admission of guilt 'was an integral part of the . . . discharge process.'"[20] The CAAF held that the earlier charges that formed the basis of the request for discharge were still pending because the accused had not yet "received the benefit of his bargain in the earlier case," that is, an executed discharge.[21]

If *Vasquez* left any questions unanswered regarding the extent of protection afforded to an accused under MRE 410, *Anderson* now makes it clear. During the government's pre-

9. MCM, *supra* note 1, R.C.M. 1001(b)(2).

10. *Id.* Rule for Courts-Martial 1001(b)(2) defines "[p]ersonnel records of the accused" as "any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." *Id.*

11. 55 M.J. 182 (2001).

12. *Id.* The unauthorized absence began on 19 September 1997 and was terminated by apprehension on 28 September 1998. *Id.*

13. *Id.* at 183. The document was dated 10 September 1997 and was from the Commanding Officer, Naval Air Station, Jacksonville, Florida. The discharge in lieu of trial by court-martial was for offenses preceding the charges of which the accused had been found guilty. *Id.*

14. Military Rule of Evidence 410(a)(4) makes inadmissible in any court-martial proceeding against the accused "any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." MCM, *supra* note 1, MIL. R. EVID. 410(a).

15. *Anderson*, 55 M.J. at 183.

16. 54 M.J. 303 (2001). *Vasquez* was discussed at length in the 2001 new developments article. *See* Major Tyler Harder, *New Developments in Sentencing: The Fine Tuning Continues, but Can the Overhaul Be Far Behind?*, ARMY LAW., May 2001, at 67.

17. *Anderson*, 55 M.J. at 183 (quoting *Vasquez*, 54 M.J. at 305 (quoting United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986))).

18. *Id.* (quoting *Vasquez*, 54 M.J. at 305 (citing United States v. Ariail, 48 M.J. 285, 287 (1998))).

19. *Vasquez*, 54 M.J. at 304.

20. *Anderson*, 55 M.J. at 184 (quoting *Barunas*, 23 M.J. at 75). Military Rule of Evidence 410(b) defines a "statement made in the course of plea discussions" to include "a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial." MCM, *supra* note 1, MIL. R. EVID. 410(b).

21. *Anderson*, 55 M.J. at 184.

sentencing case, MRE 410 keeps out *any* evidence of an accused's discharge in lieu of trial by court-martial, not just admissions or statements by the accused.

Prior Convictions

Evidence of prior convictions is the third category of government pre-sentencing evidence found in RCM 1001(b).[22] The rule states that "any evidence admissible under the Military Rules of Evidence" may be used to prove the conviction.[23]

In *United States v. Douglas*,[24] the Air Force Court of Criminal Appeals (AFCCA) addressed whether the promulgating order and stipulation of fact were properly admitted to prove a prior conviction of the accused. The accused pled guilty to wrongful appropriation, making and uttering a worthless check, and wrongful use of his government travel card. During presentencing, the trial counsel moved to admit a copy of the promulgating order and the stipulation of fact from a prior court-martial of the accused.[25] The defense objected to the admission of the stipulation of fact and to the portion of the promulgating order indicating the accused's sentence.[26] The military judge allowed both documents into evidence, but ordered redaction of the portion of the promulgating order indicating the accused's sentence[27] and two portions of the stipulation of fact.[28] The record indicated that the trial counsel failed to redact these portions before providing the documents to the members. The accused argued on appeal that he was denied a fair trial because the members received the entire unredacted documents, and that the military judge erred in admitting the stipulation of fact.[29]

The AFCCA first addressed the promulgating order, determining that the document was admissible in its entirety under RCM 1001(b)(3). The court stated that "[a]s a matter of law, the sentence adjudged and the action of the convening authority are relevant parts of such a promulgating order."[30] It disapproved of the trial counsel's failure to abide by the military judge's order, but found no prejudice to the accused because the redacted portion was admissible and relevant anyway.

Second, the court addressed the stipulation of fact. It summarized the holdings of the various service courts on whether evidence of the underlying facts of a prior conviction is admissible under RCM 1001(b)(3). The Army Court of Criminal Appeals (ACCA) has held that when a court-martial order is vague and fails to provide sufficient details to the members regarding the prior conviction, "a stipulation of fact is *admissible* to explain the circumstances of the prior conviction."[31] The NMCCA has held that evidence of "the detailed facts underlying a prior conviction is *inadmissible* in the prosecution's case-in-chief during sentencing."[32] The AFCCA had previously held in an unpublished opinion, *United States v. Bellanger*,[33] that evi-

22. MCM, *supra* note 1, R.C.M. 1001(b)(3)(A). "The trial counsel may introduce evidence of military or civilian convictions of the accused." *Id*. At the time this article was going to print, RCM 1001(b)(3) was amended to clarify "civilian convictions." *See* Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,744 (Apr. 17, 2002).

23. *Id.* R.C.M. 1001(b)(3)(C). The discussion to RCM 1001(b)(3)(C) states further that "previous convictions may be proved by the use of the personnel records of the accused, by the record of the conviction, or by the order promulgating the result of trial." *Id.* R.C.M. 1001(b)(3)(C) discussion.

24. 55 M.J. 563 (A.F. Ct. Crim. App. 2001).

25. *Id.* at 564-65. At the accused's prior court-martial he was convicted of simple assault, attempted larceny, conspiracy to commit larceny, wrongful use of his government travel card, larceny, forgery, uttering bad checks, and dishonorably failing to pay debts. *Id.* at 567-68.

26. *Id*. at 565.

27. The military judge found the accused's sentence from the previous court-martial and the convening authority's action to be irrelevant. *Id.* at 566.

28. *Id.* The military judge found that admission of the stipulation was "'necessary to explain the facts and circumstances surrounding the offenses' of which the accused had been convicted at his previous trial." *Id.* at 565. The military judge ordered redaction of the following sections of the stipulation of fact, which contained uncharged misconduct:

> In order to determine whether or not the stolen credit card was activated, Amn Douglas and A1C Sims went to the Sunglasses Hut in the Coronado Mall.
>
> . . . .
>
> During a lawful consent search of Amn Douglas' dormitory room, numerous insufficient fund checks and past due notices were seized. Some of the items were in the trashcan, unopened and ripped in half.

Id. at 568.

29. *Id.* at 565.

30. *Id*. at 566 (citing United States v. Maracle, 26 M.J. 431 (C.M.A. 1988)).

31. *Id*. (citing United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987)) (emphasis added).

dence of the underlying details of an offense would be admissible "only when it is necessary to explain the nature of the offense and the probative value is not outweighed by the danger of unfair prejudice."[34]

In *Douglas*, the AFCCA took a new position. It specifically rejected its decision in *Bellanger*, holding that "the underlying details of a prior conviction are *not admissible* as 'evidence of civilian or military convictions' under RCM 1001(b)(3), but may be admissible as relevant personal data and character of prior service under RCM 1001(b)(2)."[35] Looking at the language of RCM 1001(b)(3), which permits evidence of convictions, the AFCCA held that the stipulation of fact was evidence upon which the conviction was based, and not evidence of the conviction.[36] Although the court determined the stipulation of fact should not have been admitted under RCM 1001(b)(3), it found the evidence was properly admitted under RCM 1001(b)(2) because the stipulation of fact had been properly maintained in the accused's personnel records.[37]

The AFCCA further found that the MRE 403[38] balancing test applied by the military judge in admitting the stipulation under RCM 1001(b)(3) was "so closely related to admissibility under RCM 1001(b)(2)" that it warranted "enormous leeway."[39] The court viewed the portions of the stipulation of fact that the military judge ordered redacted as a ruling by the military judge that such portions should have been excluded under MRE 403. Because the trial counsel failed to redact the portions of the stipulation of fact as ordered by the military judge, it was error for the stipulation to go to the members.[40]

As *Douglas* indicates, there appears to be a division among the service courts on whether a stipulation of fact should be admissible under RCM 1001(b)(3) as part of a prior conviction. The good news is that the CAAF granted review of the case on 12 December 2001,[41] and its decision should amalgamate the rulings of the service courts on this issue. Currently, practitioners can take away some helpful lessons from the AFCCA's opinion. Specifically, *Douglas* reinforces the point that trial counsel need to be prepared to articulate to the military judge which of the five categories under RCM 1001(b)(2) the evidence in question falls. More importantly, counsel should look at sentencing evidence as potentially admissible under more than one category; evidence that may not come in under one rule may be permitted under another.[42]

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32. *Id.* (quoting United States v. Brogan, 33 M.J. 588, 593 (N.M.C.M.R. 1991)) (emphasis added).

33. No. ACM 32373, 1997 CCA LEXIS 671 (A.F. Ct. Crim. App. Oct. 29, 1997) (unpublished).

34. *Douglas*, 55 M.J. at 566 (quoting *Bellanger*, 1997 CCA LEXIS 671).

35. *Id.* (emphasis added).

36. *Id.* The AFCCA held that evidence under RCM 1001(b)(3) is limited to a "document that reflects the fact of the conviction, including a description of the offense, the sentence, and any action by appellate or reviewing authorities." *Id.* (citing *Brogan*, 33 M.J. at 593).

37. *Id.* at 567. The court cited to the Air Force regulations that require the making of records of trial and the maintenance of such records. "As the appellant's first court-martial was still under appeal at the time the stipulation of fact was admitted into evidence, *the record of trial and the stipulation of fact were properly maintained in the appellant's personnel records.*" *Id.* (emphasis added).

38. Military Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MCM, *supra* note 1, MIL. R. EVID. 403.

39. *Douglas*, 55 M.J. at 567. The "enormous leeway" to which the AFCCA refers is the latitude given to the military judge in applying MRE 403 when subjected to appellate review for an abuse of discretion. *See* United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

40. *Douglas*, 55 M.J. at 567. Although the AFCCA found error in admitting the stipulation of fact, it found the error was not prejudicial to the substantial rights of the accused. *Id.*

41. United States v. Douglas, No. 01-0777/AF, 2001 CAAF LEXIS 1469 (Dec. 12, 2001). The granted issues for review are:

> I. Whether the lower court erred in holding that prosecution [exhibit] 3—the stipulation of fact from appellant's first court-martial—was properly admitted during sentencing as "relevant personal data and character of prior service" under R.C.M. 1001(b)(2), [and]
>
> II. Whether the appellant was denied a fair sentencing hearing when portions of prosecution exhibits 1 and 3, which the military judge ordered redacted, were presented to the court members without redaction and without the benefit of a curative instruction.

Id.

42. *Douglas* is one of several recent cases that illustrate this point. *See, e.g.*, United States v. Patterson, 54 M.J. 74 (2000) (expert testimony regarding patterns of pedophiles admissible under RCM 1001(b)(4) as victim impact); United States v. Ariail, 48 M.J. 285 (1998) (history of offenses admissible under RCM 1001(b)(2), but not under RCM 1001(b)(3)).

Evidence in Aggravation

The fourth category of government pre-sentencing evidence, found in RCM 1001(b)(4), is evidence of "any aggravating circumstances directly related to or resulting from the offenses of which the accused has been found guilty."[43] This includes "evidence of financial, social, psychological, and medical impact on or cost to . . . any victim of an offense committed by the accused" as well as "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."[44] This past year, the CAAF decided *United States v. Nourse*,[45] which specifically focuses on the broad "directly related to or resulting from" language of RCM 1001(b)(4).

In *Nourse*, the accused was a staff sergeant in the Marine Corps. He and another marine, Sergeant Dilembo, worked part-time for a sheriff's office in New Orleans, Louisiana. One day, while mowing grass around a sheriff's office warehouse, the two marines decided to steal rain ponchos that were stored in the warehouse. They began loading cases of ponchos into a sheriff's office truck when a deputy sheriff came upon the scene. The accused and Sergeant Dilembo fled in the truck, and the deputy pursued them for some time before eventually abandoning the chase. The accused was arrested sometime later when he returned to the sheriff's office to get his own car.[46]

At a trial by military judge alone, the accused pled guilty to conspiracy, reckless driving, larceny, wrongful appropriation, and unlawful entry.[47] During the government's pre-sentencing case, and over defense objection, the trial counsel introduced testimony from Sergeant Dilembo concerning uncharged larcenies from the sheriff's office that he and the accused had committed. The value of the property from these uncharged larcenies was about $30,000. The military judge allowed the testimony under RCM 1001(b)(4), but noted that he would only consider the testimony for the limited purpose of showing "the continuous nature of the charged conduct and its impact on the . . . Sheriff's Office."[48] The CAAF affirmed the case and found that evidence of the uncharged larcenies was admissible under RCM 1001(b)(4) as an aggravating circumstance. The evidence of uncharged larcenies was "directly related to the charged offenses as part of a continuing scheme to steal" from the Sheriff's Office.[49] It was evidence of "a continuous course of conduct admissible to show the full impact of [his] crimes upon the Sheriff's Office."[50]

The court's discussion of the admissibility of uncharged misconduct under RCM 1001(b)(4) provides a good summary of recent case law in this area. The court began with *United States v. Wingart*.[51] Wingart was convicted of indecent acts. In finding that it was error to admit evidence of prior uncharged sexual misconduct with *another* victim,[52] the *Wingart* court held that RCM 1001(b)(4), and not MRE 404(b), is the standard to apply in determining if uncharged misconduct is admissible on sentencing.[53] In other words, the test for relevance of uncharged misconduct evidence on the merits is whether the uncharged misconduct meets one of the purposes listed in MRE 404(b); but, in deciding whether the evidence of uncharged misconduct is relevant for sentencing, the question is whether it directly relates to or results from the offenses of which the accused has been convicted.[54] Referring to the admissibility of uncharged misconduct on sentencing under RCM 1001(b)(4), the *Wingart* court explained that such evidence could be admitted if it is preparatory to, if it accompanies, or if it follows the offense of which the accused had been found guilty.[55]

Following its discussion of *Wingart*, the court in *Nourse* discussed the holding in *United States v. Mullens*,[56] in which the accused had been convicted of sodomy and indecent acts with

43. MCM, *supra* note 1, R.C.M. 1001(b)(4).

44. *Id.*

45. 55 M.J. 229 (2001).

46. *Id.* at 230.

47. *Id.* The stolen rain ponchos were valued at $2256. *Id.*

48. *Id.* at 231. The military judge further explained: "More specifically, it's evidence of the accused's motive; his modus operandi; his intent and his plan with respect to the charged offenses. And it shows evidence of a continuous course of conduct involving the same or similar crimes, the same victim, the same general place." *Id.*

49. *Id.* at 232.

50. *Id.*

51. 27 M.J. 128 (C.M.A. 1988).

52. *See Nourse*, 55 M.J. at 131.

53. *Wingart*, 27 M.J. at 136. Military Rule of Evidence 404(b) allows for the introduction of uncharged misconduct on the merits to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MCM, *supra* note 1, MIL. R. EVID. 404(b).

54. *Wingart*, 27 M.J. at 135-36.

his children.[57] In *Mullens*, the court held that evidence of uncharged indecent acts with the *same victims* was admissible. It found that the similar misconduct (same victim, same or similar crimes, similar situs) was a "continuous course of conduct" that demonstrated the depth of the accused's sexual problems as well as "the true impact of the charged offenses on the members of his family."[58] The court followed this application of RCM 1001(b)(4) to uncharged misconduct in *United States v. Ross*[59] and *United States v. Shupe*.[60]

Finally, the court in *Nourse* addressed the accused's request to compare the holdings in *Wingart* and *Shupe*. The CAAF held that the two cases were not inconsistent. The court explained that *Mullens*, *Ross*, and *Shupe* hold that uncharged misconduct is admissible under RCM 1001(b)(4) if it shows a continuous course of conduct involving similar crimes and the same victims. This was not the case in *Wingart* because the uncharged misconduct involved a different victim.[61]

Nourse is significant for two reasons. First, it clarifies the different holdings concerning how uncharged misconduct relates to RCM 1001(b)(4) and the "directly relating to or resulting from" language. Past opinions in this area are still good law, and counsel and military judges now have a case that ties those various opinions together. Second, this case reemphasizes the important sentencing principle from *Wingart*—when looking at the relevance and admissibility of uncharged misconduct during the government's pre-sentencing case, practitioners need to use RCM 1001(b)(4) in determining relevance, not MRE 404(b).

The Defense Case in Extenuation and Mitigation

Whereas RCM 1001(b) addresses government evidence, RCM 1001(c) addresses defense evidence. Generally, the defense can present three categories of evidence at trial during pre-sentencing. Those categories are matter in extenuation, matter in mitigation, and a statement by the accused.[62] This past year the CAAF decided four cases addressing defense pre-sentencing evidence. The first three cases involve a matter in mitigation—retirement benefits. The fourth case focuses on the statement by the accused.

Matter in Mitigation

The first of the three retirement benefits cases is *United States v. Luster*.[63] The accused was an E-5 with eighteen years and three months of active service in the Air Force at the time of his trial. He pled guilty to one specification of wrongful use of marijuana.[64] At trial, the trial counsel made a motion in limine to keep out defense evidence of the financial impact a bad-conduct discharge would have on the accused's expected retirement benefits. The military judge granted the motion on the grounds that such evidence was irrelevant and would be confusing to the members.[65] The service court affirmed the case, finding that the accused suffered no prejudice from the military judge's ruling.[66]

The CAAF reversed the decision as to sentence, however, finding first that the military judge erred in preventing the defense from introducing financial impact evidence, and second, that the accused was materially prejudiced by this error. Reviewing the line of cases that address retirement-benefits evidence, the CAAF reiterated its holding in *United States v.*

55. *Id.* at 135. The *Wingart* court provided examples of these three areas: preparatory to the crime, such as "an uncharged housebreaking that occurred prior to a larceny or rape;" accompanying the crime, such as "an uncharged aggravated assault, robbery, or sodomy incident to a rape;" and following the crime, such as "a false official statement concealing an earlier theft of government property." *Id.*

56. 29 M.J. 398 (C.M.A. 1990).

57. *See Nourse*, 55 M.J. at 131-32.

58. *Mullens*, 29 M.J. at 400.

59. 34 M.J. 183 (C.M.A. 1992) (evidence of twenty to thirty altered test scores was admissible to show the "continuous nature of the charged conduct and its full impact on the military community" even though accused was only convicted of altering four test scores).

60. 36 M.J. 431 (C.M.A. 1993) (evidence of five uncharged drug transactions was admissible as proper aggravation because it showed "the continuous nature of the charged conduct and its full impact on the military community").

61. *Nourse*, 55 M.J. at 231-32.

62. *See* MCM, *supra* note 1, R.C.M. 1001(c). Matter in extenuation is evidence that serves to explain the circumstances surrounding the commission of the offense. *Id.* R.C.M. 1001(c)(1)(A). Matter in mitigation is any evidence which might tend to lessen the punishment adjudged by the court-martial. *Id.* R.C.M. 1001(c)(1)(B). The statement by the accused can be given under oath, or the accused can elect to give an unsworn statement. *Id*. R.C.M. 1001(c)(2).

63. 55 M.J. 67 (2001).

64. *Id*. The accused's approved sentence was reduction to E-1 and a bad-conduct discharge. *Id.*

65. *Id*. at 70.

Becker;[67] that is, just because an accused is not retirement eligible at the time of his trial does not mean the defense is precluded from introducing evidence of the estimated retirement pay the accused would lose if he receives a punitive discharge.[68] The court noted that the military judge had some discretion to admit such evidence, but stated that "the judge's decision should not be based solely on the number of months until an accused's retirement where other facts and circumstances indicate that the loss of these benefits is a significant issue in the case."[69] In *Luster*, the accused would not have had to reenlist to be eligible to retire, the probability of his retirement was not shown to be remote, and the expected financial loss was substantial. The CAAF concluded that the accused had been "significantly disadvantaged" by not being allowed to present his specific sentencing case to the members, and thus found prejudicial error.[70]

The second retirement benefits case decided by CAAF this past year is *United States v. Boyd*.[71] Captain Boyd had served fifteen and a half years of active duty in the Air Force. He worked as a nurse in the Intensive Care Unit and was charged with various offenses for taking prescription drugs from the hospital for personal use.[72] Before trial, a physical evaluation board had recommended the accused for temporary disability retirement based upon various mental disorders. At trial, the defense requested that the military judge provide a sentencing instruction on retirement benefits because the accused was "perilously close to retirement."[73] The military judge refused to give the instruction.[74]

On appeal, the accused argued that the military judge should have instructed the members on both his future length of service retirement benefits and his temporary disability retirement benefits.[75] The CAAF looked first at the issue of retirement for length of service, and decided it was unnecessary to determine if fifteen and a half years of service constituted a "sufficient evidentiary predicate" for an instruction on the impact of a punitive discharge on retirement benefits. The accused had not offered any evidence of the projected financial loss of his retirement, nothing was said about his desire to retire in his unsworn statements, the members had no questions about retirement benefits, and the defense never asked the members to save the accused's retirement. Thus, the court reasoned, even if it was error to fail to provide the instruction, it was harmless error.[76] Likewise, in regard to the issue of temporary disability retirement benefits, the court found "no factual predicate for an instruction."[77] The accused did not request an instruction on loss of disability retirement, nor did the defense present any evidence to the members regarding the accused's eligibility for disability retirement. The court, finding no error, affirmed the case.[78]

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66. *Id.* The AFCCA looked to several facts in finding no prejudice. First, the military judge allowed counsel to voir dire the members regarding the length of the accused's service; second, during sentencing argument, defense counsel was able to argue the length of service; third, the accused discussed his years of service during his unsworn statement; and finally, the military judge instructed the members that a bad-conduct discharge would deny the accused "the opportunity to serve the remainder of his 21-month enlistment and, therefore, preclude the eligibility for retirement benefits." *Id.*

67. 46 M.J. 141 (1997) (in which the accused had over nineteen years and eight months of service, it was error for the military judge to exclude defense evidence of the value of projected retirement benefits).

68. *Luster*, 55 M.J. at 68. In *Becker*, the court found the individual circumstances of the case (accused was "literally knocking at retirement's door," he had requested an opportunity to present loss retirement evidence, and he had such evidence available to present) "clearly warranted admission of the evidence." *Becker*, 46 M.J. at 144.

69. *Luster*, 55 M.J. at 71.

70. *Id.* at 72. The CAAF stated that "the critical question is not whether the members generally understood that retirement benefits would be forfeited by a punitive discharge," but rather whether the accused "was allowed to substantially present his particular sentencing case to the members on the financial impact of a punitive discharge." *Id.*

71. 55 M.J. 217 (2001).

72. *Id.* at 218. The accused's approved sentence was a dismissal, ninety days' confinement, and forfeiture of $215 per month for three months. *Id.*

73. *Id.* at 219. The CAAF noted that both the defense counsel and the military judge were referring to retirement benefits for *length of service* and not *temporary disability retirement*. *Id.*

74. *Id.* The military judge provided the standard instruction regarding the impact of a dismissal, and in response to a member's question (would the accused continue to serve in the Air Force if a dismissal were not adjudged?), the military judge emphasized the punitive nature of the dismissal and cautioned the panel against viewing it as a decision to merely retain or separate the accused. *Id.* at 220.

75. *Id.* at 220. The sentencing instructions aspect of this case is discussed later in this article. *See infra* notes 130-42 and accompanying text.

76. *Boyd*, 55 M.J. at 221.

77. *Id.* at 222.

78. *Id.*

The third retirement benefits case is *United States v. Washington*.[79] Published shortly after the CAAF's decisions in *Luster* and *Boyd*, *Washington* simply reemphasizes the court's earlier holdings. In *Washington*, the accused was an E-4 with over eighteen years of active service. She had been court-martialed less than a year earlier for offenses related to wrongful use of her government travel card, and she had been reduced from E-5 to E-4, confined for three months, and given a reprimand.[80] At her second court-martial, the accused pled guilty to one specification of larceny, and she sought to introduce during the pre-sentencing case evidence of her expected financial loss of retirement benefits if she were given a punitive discharge.[81] The military judge refused to admit the evidence.[82]

On appeal, the CAAF found that the "military judge erred when she prevented the defense from presenting to the members a complete picture of the financial loss [the accused] would suffer as a result of a punitive discharge."[83] Further, the CAAF concluded that the error materially prejudiced the accused. The court looked at the evidence that both sides presented, and it stated that the decision to adjudge a punitive discharge in this case was a close call. The accused was "denied the opportunity to present her particular sentencing case to the members," and because the court was unable to "say with reasonable certainty that the members' decision as to sentence would have been the same if the excluded information had been presented to them," the CAAF set aside the sentence.[84]

The CAAF has made it clear from these decisions that the defense has a right under RCM 1001(c)(1)(B) to present evidence of expected financial loss of retirement benefits as a matter in mitigation, even before the accused is retirement eligible. While it is unclear how close to retirement a service member must be, it is clear that there are no per se rules to follow. The CAAF has asked military judges to look at all the facts and circumstances in a given case;[85] however, two questions that should be asked in any case in which the defense seeks to introduce retirement-benefit evidence are: (1) how remote the probability of retirement is, and (2) whether the expected financial loss is substantial.[86] These questions may not be terribly helpful guidance in the practical sense. The answer to the second question is always going to be "yes," and the crux of the first question is the length of time a service member has remaining until retirement. A record of trial that indicates the military judge considered these questions, however, will likely withstand appellate scrutiny better than one that does not.

While the number of months until retirement and the question of whether a service member has to reenlist to make it to retirement seem to be the biggest factors to consider,[87] the hard reality of these opinions may be that military judges simply admit retirement evidence out of an abundance of caution. After all, the members know that a punitive discharge deprives an accused of retirement eligibility, the defense counsel argues that fact, and the judge instructs on that fact.[88] At least in cases involving service members within two to three years of retirement eligibility, evidence of expected loss of retirement pay would always appear to be a significant issue that the defense is entitled to address.[89]

Statement by the Accused

The statement by the accused is the last category of defense pre-sentencing evidence found in RCM 1001(c).[90] The rules provide the accused with the right to give an unsworn state-

79. 55 M.J. 441 (2001).

80. *Id.* at 443.

81. *Id.* at 441-42. The accused's approved sentence was a bad-conduct discharge, two months' restriction, and reduction to E-2. *Id.* at 441.

82. *Id.* at 442. It is unclear from the opinion what the military judge's reasons were for not admitting the evidence; however, because the military judge was the same judge who sat in *Luster*, the two cases were tried within two months of each other, and the accused in both cases had about the same length of active service, it can probably be assumed that the reasons for not admitting the evidence in *Washington* were the same reasons for not admitting the evidence in *Luster* (that is, the evidence was confusing and irrelevant). *See* United States v. Luster, 55 M.J. 67, 69-70 (2001).

83. *Washington*, 55 M.J. at 442.

84. *Id.* at 443.

85. *See, e.g.*, *Luster*, 55 M.J. at 71. "The judge's decision should not be based solely on the number of months until an accused's retirement *where other facts and circumstances indicate that the loss of those benefits is a significant issue* in the case." *Id*. (emphasis added).

86. *See id.*

87. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-6-10 (1 Apr. 2001) [hereinafter BENCHBOOK].

88. This is assuming, of course, an instruction is warranted. *See infra* notes 139-40 and accompanying text.

89. Notably, *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989), in which the court found no error when the military judge refused to allow the defense to introduce evidence of the effect of a punitive discharge on the accused's retirement benefits when the accused was over three years from retirement and would have to reenlist, has not been expressly overruled. As an aside, Chief Judge Crawford dissented in both *Luster* and *Washington*. *See Washington*, 55 M.J. at 443 (Crawford, C.J., dissenting); *Luster*, 55 M.J. at 72 (Crawford, C.J., dissenting).

ment. An unsworn statement (that is, not under oath) is not subject to cross-examination by the government.[91] The accused has been given great latitude in deciding what to say during an unsworn statement in recent years.[92] This past year the CAAF addressed whether the defense should be allowed to reopen its case so that the accused could provide a second unsworn statement.

In *United States v. Satterley*,[93] the accused pled guilty to four specifications of larceny, and he entered into a stipulation of fact in which he admitted to stealing nine computers, of which the government had recovered only five. After the government and defense rested and the sentencing instructions were given, the members asked several questions. One question was what happened to the four computers that were not recovered. The defense counsel requested to reopen the defense case to answer the court member's question in the form of a second unsworn statement. The military judge stated that if both sides could agree, he would allow a stipulation of fact to address the question, or the accused could take the stand and testify under oath, but he denied the defense request to answer the question via an unsworn statement.[94]

On appeal, the accused argued that the military judge erred by not allowing the defense to reopen its case to make a second unsworn statement. The CAAF recognized the valuable right of an accused to provide an unsworn statement and the right of an accused to provide an additional unsworn statement in surrebuttal circumstances.[95] The court acknowledged that there may even be "other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement;" however, whether those circumstances exist is a decision that is properly left to the sound discretion of the trial judge.[96]

The CAAF concluded in *Satterley* that the military judge had not abused his discretion. First, the accused had already provided an unsworn statement, and at that time he had chosen not to disclose the whereabouts of the other four computers. Second, both sides had rested, both sides had made closing arguments, and sentencing instructions had already been provided to the members. Third, the military judge had addressed the member's question by providing protective instructions. Fourth, the government could have disputed the accused's answer, thus prolonging the litigation. Finally, the military judge had given the accused reasonable options to answer the panel member's question, such as a stipulation of fact or providing sworn testimony.[97]

Practitioners should not read *Satterley* too broadly. The CAAF was careful to find no abuse of discretion "in these circumstances."[98] Would the case have been decided differently had the defense not already rested its case or if the accused had not provided an initial unsworn statement? What if the judge had not provided any protective instructions or had not offered the accused any alternative ways to provide the information? This opinion obviously does not answer these questions, but it does provide confirmation on another matter—the level of scrutiny appellate courts apply when reviewing military judges' decisions. While the court continued to underscore the prominence of the unsworn statement, military judges can take some solace in the court's willingness to defer to the "sound discretion of the trial judge" whether the circumstances warrant providing the accused with an additional unsworn statement.

Sentencing Arguments

Following the introduction of matters by both the prosecution and the defense, RCM 1001(g) provides both sides the opportunity to argue.[99] If the opposing counsel fails to object to an improper argument before the military judge begins to instruct the members on sentencing, the objection is waived, absent plain error.[100] In most cases, the issue on appeal concerns an objection to a trial counsel's argument; however, the

90. MCM, *supra* note 1, R.C.M. 1001(c)(2).

91. *See id*. R.C.M. 1001(c)(2)(C).

92. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998) (accused wanting to inform members that if the court did not punitively discharge him, his commander would administratively discharge him); United States v. Jeffery, 48 M.J. 229 (1998) (accused wanting to discuss his potential loss of retirement benefits and inform members that he might receive an administrative discharge if the court did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (accused wanting to inform members the resolution of co-conspirators' cases).

93. 55 M.J. 168 (2001).

94. *Id*. at 169.

95. *Id.* at 170-71 (citing United States v. Provost, 32 M.J. 98 (C.M.A. 1991) (holding that a second unsworn statement in surrebuttal should have been permitted after the prosecution presented evidence rebutting the accused's first unsworn statement)).

96. *Id.* at 171.

97. *Id.*

98. *Id*. One judge disagreed with the holding of the case. *See id.* (Effron, J., dissenting).

99. MCM, *supra* note 1, R.C.M. 1001(g).

CAAF has addressed a number of cases recently in which the issue on appeal was whether the *defense counsel* made an improper sentencing argument.[101] These issues are normally raised on appeal as ineffective assistance of counsel claims,[102] as in *United States v. Anderson*.[103]

Staff Sergeant Anderson was convicted of five specifications of indecent acts with his thirteen-year-old daughter. During the sentencing argument, the defense counsel stated: "Can this person rehabilitate? . . . [Y]es, John Anderson can rehabilitate. . . . *His offenses are only very recent.*"[104] On appeal, the accused argued that his defense counsel was ineffective because the counsel improperly conceded the accused's guilt in argument.[105] The CAAF cited to *United States v. Wean*,[106] wherein the court held that the "[d]efense counsel should not concede an accused's guilt during sentencing . . . because this can serve to anger the panel members."[107] The court in *Anderson* did not rule on this specific issue, but instead sent the case back for a fact-finding hearing on other alleged issues of ineffective assistance of counsel. The court stated that the sentencing argument could be interpreted as a concession of guilt and "warrants further evaluation after the factual issues are resolved."[108]

A second case decided by the CAAF this past year, *United States v. Bolkan*,[109] addresses a similar but more common issue—the defense counsel conceding the appropriateness of a punitive discharge during sentencing argument.[110] In *Bolkan*, the accused was an Airman First Class in the Air Force, assigned as a student at the Defense Language Institute in California. One weekend he and his friend, Airman Miller, went to a party in San Francisco, where they met the victim, who claimed to be an owner-producer of an adult film business.[111] The victim asked the two airmen if they would be interested in working in the adult film industry, and he invited them to his one-room apartment to fill out an application. He told them they would receive compensation of $100 per film. The two airmen agreed, and both completed lengthy questionnaires at the victim's apartment. The victim then explained to them that the second part of the interview required that they be videotaped while masturbating to determine their comfort level while being filmed. Both servicemen declined.[112]

Sometime later, the accused returned to visit the victim, and on this visit the accused completed a second interview, to include masturbating in front of the camera.[113] The accused started having second thoughts and returned again to visit the victim, this time accompanied by Airman Miller. The victim was told that Airman Miller wanted to complete a second interview as well. Once at the apartment, Airman Miller grabbed the victim by the neck and held a knife to his throat while the accused recovered the questionnaires and videotape. The airmen attempted to tape the victim's legs, but the victim resisted, telling them that they could have what they wanted if they would just release him. The accused and Airman Miller left, warning the victim not to discuss the incident with anyone.[114]

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100. *Id.*; *see* United States v. Ramos, 42 M.J. 392 (1995).

101. *See, e.g.*, United States v. Burt, 56 M.J. 261 (2002); United States v. Bolkan, 55 M.J. 425 (2001); United States v. Anderson, 55 M.J. 198 (2001); United States v. Pineda, 54 M.J. 298 (2001).

102. *See* Strickland v. Washington, 466 U.S. 668 (1984) (two components must be met to prevail on an ineffective assistance of counsel claim: (1) a showing that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense).

103. 55 M.J. 198 (2001).

104. *Id.* at 200 (emphasis added). The accused was sentenced to a dishonorable discharge, nine years' confinement, and reduction to E-1. *Id.* at 199.

105. *Id.* at 201. The accused claimed that both of his defense counsel were ineffective for numerous other reasons. Only the improper concession of guilt is addressed here. *Id.*

106. 45 M.J. 461 (1997).

107. *Anderson*, 55 M.J. at 202 (quoting *Wean*, 45 M.J. at 464).

108. *Id.* at 203.

109. 55 M.J. 425 (2001).

110. *See, e.g.*, United States v. Burt, 56 M.J. 261 (2002); United States v. Pineda, 54 M.J. 298 (2001).

111. *Bolkan*, 55 M.J. at 426.

112. United States v. Bolkan, No. ACM33508, 2000 CCA LEXIS 156, *2 (A.F. Ct. Crim. App. June 20, 2000).

113. *Bolkan*, 55 M.J. at 426.

114. *Bolkan*, 2000 CCA LEXIS 156, at *3.

At trial, the accused was convicted of robbery. On sentencing, in his unsworn statement, he indicated his desire to remain in the Air Force. During the sentencing argument, the defense counsel strenuously argued against confinement and a punitive discharge.[115] In closing, the defense counsel stated,

> If you must choose between confinement and a bad-conduct discharge, give him the punitive discharge. He might not ever recover from it and it will follow him around the rest of his life, but he will be given a chance to go out in society and use his skills and his intelligence.[116]

The accused argued on appeal that his defense counsel improperly conceded the appropriateness of a punitive discharge and that the military judge erred by not inquiring into the matter.[117]

The CAAF acknowledged the long line of cases which "clearly instruct that when an accused asks the sentencing authority to be allowed to remain on active duty, defense counsel errs by conceding the propriety of a punitive discharge."[118] Then, even though the accused did not explicitly claim ineffective assistance of counsel, the court applied the second prong of the *Strickland* analysis, testing for prejudice.[119] The court assumed that the argument made by the defense was a concession and that the military judge erred in not inquiring into whether such argument reflected the accused's desire.[120] Looking at the seriousness of the offense and the likelihood of a bad-conduct discharge, the CAAF concluded that any such error was harmless.[121]

Notably, two judges dissented and found prejudicial error in this case.[122] A third judge concurred in the result. He found error, and after providing a more helpful analysis than the lead opinion, agreed that a bad-conduct discharge was reasonably likely; thus, the error was harmless.[123]

Anderson and *Bolkan* serve to remind practitioners, especially defense counsel and military judges, that defense counsel can make comments during sentencing arguments that are just as problematic on appeal as any improper sentencing arguments made by trial counsel. Defense counsel need to think through their arguments in advance. The defense counsel should not concede the accused's guilt during sentencing argument, and should not argue for or concede the appropriateness of a punitive discharge without first discussing it with the client. If such an argument is made, the military judge should inquire into whether the argument correctly reflects the desire of the accused.

Sentencing Instructions

Before the members deliberate on an appropriate sentence, the military judge must provide them with appropriate sentencing instructions.[124] The discussion to RCM 1005 states that the instructions "should be tailored to the facts and circumstances

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115. *Bolkan*, 55 M.J. at 427. The defense counsel argued:

> But do not give him a punitive discharge. If his conduct is such that you want to brand him for the rest of his life with a punitive discharge, the judge will instruct you that a punitive discharge leaves an inirradicable [sic] stigma on a person such as Airman Bolkan.
>
> The crime of which he's been convicted of, society may one day forgive him and may one day forget it. He's eighteen. He's young. He's naive. But if you give him a punitive discharge, that's going to follow him around for the rest of his life. When he's nineteen, twenty-nine, fifty-nine, seventy-nine. That is not something society is ever going to forgive or forget.
>
> The defense would submit that you should give him hard labor without confinement, reduce him to E-1 and restrict him to base. And give him the reprimand. This will stay in his file permanently and every commander that he has will see that in his file.

Id.

116. *Id.*

117. *Id.*

118. *Id.* at 428 (citing United States v. Pineda, 54 M.J. 298 (2001); United States v. Lee, 52 M.J. 51 (1999); United States v. Dresen, 40 M.J. 462 (C.M.A. 1994); United States v. Lyons, 36 M.J. 425 (C.M.A. 1993); United States v. Robinson, 25 M.J. 43 (C.M.A. 1987); United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971); United States v. Weatherford, 42 C.M.R. 26 (C.M.A. 1970); United States v. Mitchell, 36 C.M.R. 458 (C.M.A. 1966)).

119. *Id. See also supra* note 102.

120. *See* BENCHBOOK, *supra* note 87, para. 2-7-27 (providing instructional guidance for military judges in situations of this nature).

121. *Bolkan*, 55 M.J. at 428.

122. *Id.* at 431 (Sullivan, J., dissenting); *id.* (Effron, J., dissenting). Judge Sullivan applied the test for prejudice found in *United States v. Pineda*, 54 M.J. 298 (2001), which is whether a punitive discharge was reasonably likely given the facts of the case. *Id.* (Sullivan, J., dissenting).

123. *Id.* at 429 (Baker, J., concurring in the result).

of [each] case."[125] Rule for Courts-Martial 1005(c) also allows trial and defense counsel to request that the military judge provide specific instructions.[126] Several cases last year touched upon various aspects of sentencing instructions.

In *United States v. Rush*,[127] the defense requested the standard sentencing instruction on the "ineradicable stigma" of a punitive discharge. The military judge refused to give the instruction, but did not explain the basis for his decision on the record.[128] On appeal, the CAAF held that the military judge's refusal to grant the instruction without an explanation for his decision constituted error.[129]

In *United States v. Boyd*,[130] a case discussed earlier in this article,[131] the CAAF addressed the military judge's refusal to grant the defense's request for an instruction on the impact of a punitive discharge on the loss of retirement benefits.[132] Captain Boyd had fifteen and a half years of active service in the Air Force and worked as a nurse in the Intensive Care Unit. He was convicted of various offenses related to taking prescription drugs from the hospital for personal use. Before his court-martial, a physical evaluation board had recommended the accused for temporary disability retirement, but no mention of this disability retirement was made to the members by counsel for either side.[133]

During the hearing on sentencing instructions, the defense requested the military judge to provide an instruction on retirement benefits. The military judge refused. The judge did provide the standard instruction regarding the impact of a dismissal.[134] After the instructions were provided to the members, one member asked what impact a punitive dismissal would have on the accused's continued service—whether the accused would continue to serve in the Air Force. After conferring with counsel and the accused, the military judge gave an additional instruction in which he emphasized the punitive nature of the dismissal and cautioned the panel against viewing the dismissal as a decision to merely retain or separate the accused.[135] Following deliberations, the members sentenced the accused to a dismissal, ninety days' confinement, and forfeiture of $215 per month for three months. On appeal, the accused argued that the military judge should have instructed the members on his length of service retirement benefits and his temporary disability retirement benefits.[136]

First, the CAAF stated that it reviews "a military judge's decision whether to instruct on a specific collateral consequence of a sentence for abuse of discretion."[137] Next, the court looked at the issue of retirement for length of service, and it concluded that the failure to provide the requested instruction did not have a "substantial influence on the sentence."[138] More importantly, however, the court stated: "[W]e will require military judges in all cases tried after [10 July 2001] to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."[139] The court added that military judges need to lib-

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124. *See* MCM, *supra* note 1, R.C.M. 1005.

125. *Id.* R.C.M. 1005(a) discussion.

126. *Id.* R.C.M. 1005(c).

127. 51 M.J. 605 (Army Ct. Crim. App. 1999).

128. *Id.* at 606-07.

129. 54 M.J. 313, 315 (2001). Last year's annual review of instructional issues discussed this case. *See* Lieutenant Colonel William T. Barto & Lieutenant Colonel Stephen R. Henley, *Annual Review of Developments on Instructions—2000*, ARMY LAW., July 2001, at 16.

130. 55 M.J. 217 (2001).

131. *See supra* notes 71-78 and accompanying text (defense case in extenuation and mitigation).

132. *Boyd*, 55 M.J. at 217.

133. *Id.* at 218.

134. *Id.* at 219. The military judge instructed the members:

> A dismissal is a punitive discharge. Our society commonly recognizes the ineradicable stigma of a punitive discharge, and a punitive discharge affects the accused's future with regard to legal rights, economic opportunities, and social acceptability and will deny the accused other advantages which are enjoyed by one whose discharge indicates that he has served honorably. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service.
>
> A sentence to a dismissal of an officer is the general equivalent of a dishonorable discharge for an airman. A dismissal should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A person dismissed from the armed forces is denied substantially all veteran's benefits. You are not required to adjudge a discharge, but if you do, you may only adjudge a dismissal.

Id. at 219-20.

erally grant requests for such instructions. A military judge may deny a request for such an instruction only when there is no evidentiary predicate for the instruction, or when "the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence."[140] In this case, the court did not decide whether fifteen and a half years of service was a "sufficient evidentiary predicate" to require an instruction on retirement benefits. It concluded that the evidentiary predicate for such an instruction was "minimal" because the defense had not offered any evidence of retirement benefits, nor did the accused or counsel discuss the importance of retirement during the pre-sentencing case. Finally, the CAAF addressed the issue of temporary disability retirement, noting immediately that the defense did not request an instruction on the impact of a punitive discharge on temporary disability retirement. There was no factual predicate for an instruction on disability retirement because, for undisclosed reasons, the defense chose not to present any evidence concerning the accused's eligibility for disability retirement.[141]

Although the CAAF affirmed the decision in *Boyd*, the case has obvious impact on military judges. Judges must now be prepared to provide an instruction on how a punitive discharge affects retirement benefits if such an instruction is requested. The decision to grant the requested instruction could get more complicated than it might appear. Not only must military judges determine whether a sufficient evidentiary predicate exists, they may also have to determine what "remote" means when deciding if the possibility of retirement is so remote as to make it irrelevant. Further, as the court noted in *Boyd*, if the defense gets an instruction on future retirement benefits, then the prosecution may be entitled to an instruction on "the legal and factual obstacles to retirement faced by a particular accused."[142]

Another recent CAAF decision also touches upon the issue of retirement benefits and sentencing instructions, although in a different way. In *United States v. Burt*,[143] the accused was court-martialed for failing to obey orders, marijuana use, assault consummated by a battery, and adultery. At the time of trial, he was an E-4 with over twenty-one years of active service. Unfortunately, this was his second court-martial within twelve months. At the first court-martial, he was convicted of marijuana and cocaine use and was reduced from E-7 to E-4.[144] Before instructing the members on sentencing, the military judge offered to read the following instruction:

> If a punitive discharge is adjudged, if approved and ordered executed, the accused will lose all retirement benefits. However, regardless of the sentence of this court, even if a punitive discharge is adjudged, the Secretary of the Air Force or his designee may instead allow the accused to retire from the Air Force.[145]

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135. *Id.* at 220. The additional instruction was the following:

> You have a duty to determine an appropriate punishment for the accused in this case. That may include a decision on whether to sentence the accused to be discharged punitively from the service. If you determine a punitive discharge is warranted in this case, then the only punitive discharge this court may adjudge is a dismissal. You are advised, however, that a decision not to include a dismissal in your sentence does not mean the accused would necessarily be retained in the service. Such a decision would only reflect your judgment that he does not deserve a punitive discharge and the stigma that goes with it. Your decision regarding a punitive discharge is but one part of the process of determining an appropriate punishment, and it must not be viewed merely as a decision to retain or separate the accused from the service.

Id.

136. *Id.*

137. *Id.* (citing United States v. Perry, 48 M.J. 197 (1998)).

138. *Id.* at 221.

139. *Id.* The court stated:

> The instruction should be appropriately tailored to the facts of the case with the assistance of counsel, and it should include language substantially as follows: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits."

Id. (quoting BENCHBOOK, *supra* note 87, para. 2-6-10).

140. *Id.* at 221.

141. *Id.* at 222.

142. *Id.* at 221 n.1.

143. 56 M.J. 261 (2002).

144. *Id.* at 262. The approved sentence in his second court-martial was a bad-conduct discharge, confinement for two years, and reduction to E-1. *Id.*

The defense objected to the instruction and asked that it not be provided to the members.[146]

On appeal, the accused argued that he received ineffective assistance of counsel when his counsel requested that the military judge not read the instruction.[147] The CAAF applied the standard in *Strickland* and held that defense counsel's performance was not deficient.[148] It viewed the defense decision as a "logical choice not to let the members off the proverbial hook."[149] If the members were provided the proposed instruction on retirement benefits, it was quite possible that they would adjudge a punitive discharge knowing that the Secretary of the Air Force could still override their decision and allow the accused to retire. This would allow the members to avoid the tough decision of whether to strip the accused of his retirement benefits.[150]

A final case involving sentencing instructions, *United States v. Hopkins*, was decided by the AFCCA this past year,[151] and recently affirmed by the CAAF.[152] Senior Master Sergeant Hopkins had over twenty years of active service in the Air Force at the time of his conviction.[153] During the defense's presentencing case, the accused made an unsworn statement in which he apologized and expressed sorrow for his actions.[154] Before sentencing, the defense counsel asked the military judge to instruct the members to consider the accused's expression of remorse as a matter in mitigation. The military judge declined to provide such an instruction.[155]

On appeal, the accused argued that this was error. The AFCCA affirmed the case, holding that the military judge does not have to list "each and every possible mitigating factor for the court members to consider."[156] The court stated that it is the duty of counsel to argue aggravating, extenuating, and mitigating factors to the panel, and that the military judge is only required to provide instructions as listed in RCM 1005(e).[157] The court stated that in non-capital cases the military judge complies with his duty by providing the following instruction:

> In determining the sentence, you should consider all the facts and circumstances of the offense(s) of which the accused has been convicted and all matters concerning the accused (whether presented before or after findings). Thus, you should consider the accused's background, his/her character, his/her service record, (his/her combat record,) all matters in extenuation and mitigation, and any other evidence he/she presented. You should also consider any matters in aggravation.[158]

The CAAF recently reviewed this issue and affirmed the AFCCA's decision.[159] The CAAF stated that the military judge has "considerable discretion in tailoring instructions to the evidence and law," and "how that discretion should be applied to statements of an accused, such as expressions of remorse,

145. *Id.* at 263.

146. *Id.* at 262.

147. *Id.*

148. *Id*. at 264. The first prong of the *Strickland* analysis is that the defendant must show that counsel's performance was deficient. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); *supra* note 102.

149. *Boyd*, 55 M.J. at 265.

150. *Id.*

151. 55 M.J. 546 (A.F. Ct. Crim. App. 2001).

152. United States v. Hopkins, 56 M.J. 393 (2002).

153. *Hopkins*, 55 M.J. at 547. The accused pled guilty to adultery, failing to pay debts, and making and uttering worthless checks. He was also convicted of assault consummated by a battery, assault, bigamy, falsifying visa applications, additional failure to pay debts offenses, and additional bad check offenses. *Id.*

154. *Hopkins*, 56 M.J. at 394.

155. *Id.* The military judge did provide the standard instruction to "consider all matters in extenuation and mitigation as well as those in aggravation," and he specifically instructed the members to consider the accused's unsworn statement, adding that an "unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration." *Id.*

156. *Hopkins*, 55 M.J. at 550 (citing United States v. Pagel, 40 M.J. 771 (A.F.C.M.R. 1994); United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967)).

157. *Id.* Rule for Courts-Martial 1005(e), entitled Required instructions, lists five statements required for sentencing instructions (the maximum punishment, effect of automatic forfeiture provision, procedures to follow for deliberation, members are solely responsible for selecting an appropriate sentence, and members should consider all matters in extenuation and aggravation). *See* MCM, *supra* note 1, R.C.M. 1005(e).

158. *Hopkins*, 55 M.J. at 550. The court also added that an accused's plea of guilty is a matter in mitigation and the members should be specifically instructed as such in guilty plea cases. *Id*.

regret, or apology, depends on the facts and circumstances of each particular case."[160] The statements of remorse were made in an unsworn statement in this case and "when determining how to tailor instructions to address an unsworn statement," the military judge has "broad discretion."[161] The court determined that under the facts and circumstances, it was within the military judge's discretion to decide that a general reference to the unsworn statement, rather than a more particularized instruction, adequately addressed the attention of the members to the accused's remarks.[162]

Hopkins emphasizes the broad discretion military judges have when determining appropriate instructions. As long as they include the required sentencing instructions found in RCM 1005(e), military judges have discretion in whether to give additional specific instructions to the members. Military judges must only ensure they tailor the instructions "to the facts and circumstances of the individual case."[163]

Conclusion

Sentencing issues are a frequent occurrence in the world of appellate review. As the preceding cases demonstrate, this year was certainly no exception. These cases are only a representation of the actual number of written opinions in the area of sentencing. The cases addressed cover areas of sentencing in which either the decision was significant, or a series of cases have developed a trend—for example, the court's effort in *Nourse* to reconcile past decisions addressing the use of uncharged misconduct on sentencing, or the court's effort in a series of cases to clarify and emphasize existing law on retirement benefits.[164]

This past year seemed devoted to tidying up military sentencing law. This is not to say that there are no loose ends remaining, or that additional loose ends were not created,[165] but most of the cases decided this past year lent more to clarification rather than confusion. In any event, this undoubtedly will be another exciting year in the world of sentencing. One service court decision already on the CAAF docket for review gives the court the opportunity to provide further clarification. In *United States v. Douglas*,[166] the court can clarify the law surrounding prior convictions, and mend the split among the service courts. Hopefully the CAAF will continue to tie up loose ends.

159. *Hopkins*, 56 M.J. at 394.

160. *Id.* at 395.

161. *Id*.

162. *Id.* The court added the following comment in a footnote:

> Although the requested instruction was not required under the circumstances of the present case, it is well within the discretion of a military judge to provide a more particularized instruction on the issue of remorse. Depending on the facts of the case, such an instruction might advise the members that they have heard an unsworn statement by the accused, and that, to the extent they considered the statement to contain an expression of remorse, they could consider that expression of remorse as a matter in mitigation.

Id. at 395 n.2.

163. MCM, *supra* note 1, R.C.M. 1005(a) discussion.

164. *See* United States v. Washington, 55 M.J. 441 (2001); United States v. Boyd, 55 M.J. 217 (2001); United States v. Luster, 55 M.J. 67 (2001).

165. One case not addressed in this article that may be an example of "creating a loose end," is *United States v. McDonald*, 55 M.J. 173 (2001) (holding that the Sixth Amendment's Confrontation Clause does not apply to the presentencing portion of a non-capital court-martial, but the Fifth Amendment's Due Process Clause does apply). In *McDonald*, the CAAF held it was *not* an abuse of discretion for the military judge to allow the victim's father to testify from another location via the telephone. While affirming the case, the court cautioned, "We do not suggest that telephone testimony is appropriate in all cases." *Id.* at 178.

166. No. 01-0777/AF, 2001 CAAF LEXIS 1469 (Dec. 12., 2001).